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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1959

No. 844

EDWIN J. SORKIN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting Writ	4
ARGUMENT:	
QUESTION No. 1—Whether the statute defining the crime of making a false statement in any matter within the jurisdiction of a department or agency of the United States is to be construed as requiring proof that the statement is material; and whether the Second Circuit's view on this subject, concededly at variance with the one followed in other Circuits, does not call for clarification and the resolution of the conflict in the several Circuits	5
QUESTION No. 2—Whether the striking of the testimony of a character witness for the reason that he had never spoken about petitioner was not at variance with the rule as expressed by this Court, and did not constitute reversible error	8
QUESTION No. 3—Whether the unjustifiable insinuation by the Government that petitioner had engaged in a smuggling operation was not prejudicial and reversible error	10
QUESTION No. 4—Whether the District Court did not err in excluding evidence bearing upon petitioner's intent	12
CONCLUSION	12
APPENDIX	13

Table of Cases and Other Authorities

	PAGE
Benton v. United States, 233 F. 2d 491	11
Fallen v. United States, 220 F. 2d 946	11
Fish v. United States, 215 F. 544	11
Freidus v. United States, 223 F. 2d 598	6
Helton v. United States, 221 F. 2d 338	11
Kempe v. United States, 151 F. 2d 687	11
Kraft v. United States, 238 F. 2d 794	11
Krogmann v. United States, 225 F. 2d 220	10
Lloyd v. United States, 226 F. 2d 9	11
Michelson v. United States, 335 U. S. 469	9
Paris v. United States, 260 F. 529	11
Rolland v. United States, 200 F. 2d 678	7
Underhill on Criminal Evidence, 5th Ed., Sec. 205	11
United States v. Davey, 155 F. S. 175	6
United States v. Krulewitch, 145 F. 2d 76	11
United States v. Levin, 133 F. S. 88	6
United States v. Moore, 185 F. 2d 92	6
United States v. Phillippe, 173 F. S. 582	6
United States v. Quirk, 167 F. S. 462	7
United States v. Silver, 235 F. 2d 375	7
Weinstock v. United States, 231 F. 2d 698	6

Table of Statutes

18 U. S. C. 2(a) .....
18 U. S. C. 371 .....
18 U. S. C. 1001 2
21 U. S. C. 174 .....
26 U. S. C. 2553(a) .....
26 U. S. C. 2554(a) .....
Federal Rules of Crim. Proc., Rule 17c .....
15 Code of Fed. Regulations 3723 .....
15 Code of Fed. Regulation 370.4 .....

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes Edwin J. Sorkin, by his attorney, Jacob W. Friedman, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, which Court imposed a prison sentence on petitioner.

Opinions Below

The opinion of the Court of Appeals is set forth in the Appendix, *infra*. There was no opinion by the District Judge.

Jurisdiction

The judgment of the Court of Appeals was entered on March 9, 1960. No application was made to that Court for rehearing. The jurisdiction of the Supreme Court of the United States is invoked under: 18 U. S. C. 2(a); 18 U. S. C. 371; 21 U. S. C. 173; 21 U. S. C. 174; 26 U. S. C. 2553(a); 26 U. S. C. 2554(a); and Federal Rules of Criminal Procedure, Rule 17c.

Questions Presented

1. Whether the statute defining the crime of making a false statement in any matter within the jurisdiction of a department or agency of the United States is to be construed as requiring proof that the statement is material; and whether the Second Circuit's view on this subject, concededly at variance with the one followed in other Circuits, does not call for clarification and the resolution of the conflict in the several Circuits.

2. Whether the striking of the testimony of a character witness for the reason that he had never spoken about petitioner was not at variance with the rule as expressed by this Court, and did not constitute reversible error.

3. Whether the unjustifiable insinuation by the Government that petitioner had engaged in a smuggling operation was not prejudicial and reversible error.

4. Whether the District Court did not err in excluding evidence bearing upon petitioner's intent.

Statutes Involved

18 United States Code, Section 1001, provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States

knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or devise a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned nof more than five years or both. June 25, 1948, c. 645, 62 Stat. 749."

15 Code of Federal Regulations, Chap. III, Subch. B, Section 372.3, provides:

"No commodity subject to the Export Regulations of the Bureau of Foreign Commerce may be exported to any destination without a validated license issued by the Bureau of Foreign Commerce, except where the exportation is authorized by a general license or other authorization granted, issued, or established by the Bureau of Foreign Commerce."

Statement

Petitioner herein appealed in the first instance from a judgment of the United States District Court for the Southern District of New York, convicting him of having violated the statute and regulation quoted above. A corporate codefendant was simultaneously convicted.

The indictment charged in the first count that on December 10, 1956, the defendants wilfully and knowingly made a false and fictitious statement in a shipper's export declaration to the effect that the shipment included an electron tube of type 6336, whereas it was in fact of type 6326. The second count refers to the same transaction, charging defendants with exporting the tube, valued at $440, without having obtained a validated license issued by the Bureau of Foreign Commerce.

The trial was had on November 16 and 17, 1959, before Dimock, D. J., without a jury. Both defendants were con-

victed on both counts. The corporation was fined $2,500, and petitioner was sentenced to 60 days' imprisonment on each count, the sentences to run concurrently. Petitioner was admitted to bail by the Court of Appeals prior to the argument of the appeal, and the mandate was also stayed after the rendition of the decision.

Petitioner at no time during the proceedings contended or testified that he did not make out the document in question. What he did was to describe the tube in the export declaration as type 6336, when it was actually 6326. Both types of tube were freely exportable from the United States (R. 58), and the consignee, one Weiss, was not on the restricted list of the Department of Commerce (R. 59). The misdescription may not be regarded otherwise than as a technical aberration. Petitioner had once been discharged from the same position for a comparable error (R. 151-154, 167). When he assigned the wrong number to the tube to facilitate the shipment, he did so spontaneously, impulsively and under the fear that if the shipment did not go forward, he might again lose his position (R. 168-169). He was not familiar with the provisions of the Export Control Act (R. 169-170). The episode was but one in a large volume of business handled each day by petitioner (R. 162-163). Accordingly, the record presented a close question as to petitioner's intent—apart from the matter of the materiality of the statement involved.

Reasons for Granting Writ

The opinion of the Court of Appeals presents several questions of law. In one cardinal respect—namely, the factor of materiality—the holding differs from opinions held by other Circuits on the same point. In another regard—to wit, the striking of certain character testimony—the holding conflicts with the opinion of the Supreme Court of the United States. Other rulings constituted prejudicial error. These questions will be concisely presented in the following argument.

ARGUMENT

QUESTION NO. 1

Whether the statute defining the crime of making a false statement in any matter within the jurisdiction of a department or agency of the United States is to be construed as requiring proof that the statement is material; and whether the Second Circuit's view on this subject, concededly at variance with the one followed in other Circuits, does not call for clarification and the resolution of the conflict in the several Circuits.

This point is addressed to the first count of the indictment, charging a violation of 18 United States Code, Section 1001. It may well be that the sentence imposed was directed to that count, with the concurrent sentence on the second count a formality.

A study of the statute discloses that the expression "material fact" is used in one clause but not in others. This gives rise to the question of whether the rule of *ejusdem generis* calls for a like construction (as we contend) with regard to the entire statute.

It has been indicated above that the tube described in the statement was a common type, freely exportable from the United States, provided it did not each exceed a certain value. Indeed, the Government so stipulated (R. 58). The Trial Court excluded, it may be noted, proof (R. 24-25) that an R. C. A. catalog showed the general availability of this type of tube. We also desire to point out that the official (Government printed) edition of the Code of Federal Regulations notes under the relevant Section 372.3 that "certain commodities are subject to export regulations of the other agencies of the Government. The Bureau of Foreign Commerce does not issue export licenses for these commodities." Thus implements of war come under the jurisdiction of the Department of State, as specified in 15 C. F. R., Section 370.4.

Furthermore, it was elicited from the lips of Henry W. Anderson, the agent in charge of the New York office of the Export Control Investigation Staff, Bureau of Foreign Commerce (a major Government witness, R. 33), that the consignee, one Weiss, was not on the restricted list of the Commerce Department (R. 59).

It would be difficult to sustain a conviction under the false statement statute where a prospective inductee into military service gave his birth date as April 2, 1937, when he knew it was April 1 (because he did not like to be taunted as having been born on April Fool's Day)—with the date having no bearing upon his eligibility. Similarly, a candidate for naturalization might give his former address as 67 Underhill Avenue when it had actually been 67½. Or a woman applying for a passport could describe the color of her hair as being blonde although the retention of that shade necessitated weekly treatments. Instances could be multiplied wherein individuals filling out Government forms could scarcely envisage that they had to be bound to a literal accuracy. If this rule were applied to income tax returns, it would be appalling to contemplate the millions of indictments wherewith law enforcement agencies would be confronted.

There is a respectable body of authority coinciding with our position, to wit, that 18 United States Code, Sec. 1001, must be strictly construed; that materiality is an essential ingredient of the offense defined; and that there can be no conviction unless materiality is both alleged and proved. To this effect are *United States* v. *Moore* (C. A. 5, 1950), 185 F. 2d 92; *United States* v. *Davey* (D. C. N. Y., 1957), 155 F. S. 175; *United States* v. *Phillippe* (D. C. N. Y., 1959), 173 F. S. 582; and *United States* v. *Levin* (D. C. Colo., 1953), 133 F. S. 88. With regard to the entire statute and in all of its aspects, it has been held that the falsification must be as to a material fact. *Freidus* v. *United States* (App. D. C., 1955), 223 F. 2d 598; and *Weinstock* v. *United States* (App. D. C., 1956), 231 F. 2d 698.

We do not overlook the circumstance that in a close case the Second Circuit took a contrary position. See *United States* v. *Silver* (C. A. 2, 1956), 235 F. 2d 375, cert. den. 352 U. S. 880; and see *United States* v. *Quirk* (D. C. Pa., 1958), 167 F. S. 462. *Contra*, *Rolland* v. *United States* (C. A. 5, 1952), 200 F. 2d 678.

We submit that the sound view must uphold the requirement of materiality.

It is noteworthy that the Government itself admitted the existence of differing views in the several Circuits, saying in its brief below, with regard to 18 U. S. C. 1001 (p. 5):

> "The second clause of this section, under which appellant was prosecuted, does not include materiality as an element of the crime. Although some courts have read into the statute that which is not there, this Court has specifically ruled that materiality is not an element of the crime. *United States* v. *Silver*, 235 F. 2d 375 (2d Cir.), *cert. denied*, 352 U. S. 880 (1956).

Incidentally, it was in the case cited that the late Frank, Circ. J., expressly disagreed with the interpretation of the statute adopted by his two colleagues, and declared his concurrence in the views expressed by coordinate courts of the Fifth Circuit and the District of Columbia.

The Court of Appeals herein, while citing the *Silver* case, stated in its opinion that the declaration by petitioner was material in its misdescription of the tube. This conclusion is not sustained by the record. The Government, in seeking to persuade the Court, described G. Ex. 3, a communication from the Bureau of Foreign Commerce dated February 6, 1956—more than ten months prior to the alleged crime—concerning the Weiss concern as stating that "all applications for shipments to that firm would be denied." The memorandum differs significantly in that it states such applications "are denied." In short, the Bureau was announcing its then policy without in any manner

committing itself as to what it might do almost a year later. Conclusive proof as to the change is afforded by the fact that the very declaration in this prosecution did name Weiss as consignee and was not disapproved. This should be conclusive that petitioner's original argument as to Weiss' being a permissible consignee is perfectly valid. Nor does the Government at any stage urge that a 6326-type tube was an article of such character as not to be subject to exportation.

Accordingly, the case again resolves itself into a situation wherein the consignee was not prohibited at the time; the merchandise was not restricted; and the sole complaint is a technical omission to comply with Bureau requirements, so that the issue is squarely presented whether materiality is a necessary ingredient of the crime charged.

QUESTION NO. 2

Whether the striking of the testimony of a character witness for the reason that he had never spoken about petitioner was not at variance with the rule as expressed by this Court, and did not constitute reversible error.

To attest petitioner's good character, he called as a witness one Nathan V. Tieger, a certified public accountant, who had known him for fifteen years and was "in position to know of his reputation in the business area in which he is employed" (R. 102-103). He concluded petitioner's reputation to be "very honorable" (R. 104). On cross-examination the Government elicited that the witness had never talked to any one about petitioner, and the Court thereupon granted a motion to strike the testimony of the witness (R. 105).

This ruling was, we submit, erroneous and prejudicial. Character testimony, so-called, as has often been remarked,

is properly testimony concerning an individual's reputation. Its basis is what a witness *has heard* and not what he *has said*. The witness may be the most taciturn or laconic of men. He may have heard a score of others say of a defendant that the latter is a trustworthy and honorable gentleman. Merely because the witness did not vocally concur or chime in with his own views, is he thereby disabled from giving testimony concerning defendant's reputation? To ask the question is to answer it.

The subject was given extended discussion by the Supreme Court of the United States in *Michelson* v. *United States*, 335 U. S. 469, 477, where Mr. Justice Jackson wrote:

> "The witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself * * *. Such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt * * *. All he can say of the reputation is that he has 'heard nothing against defendant.' This is permitted upon the assumption that, if no ill is asserted of one, his reputation must be good."

The application of the principles enunciated in that case conclusively establishes the error of the ruling challenged.

Nor may the matter be dismissed on the theory that the trial was had without a jury. Whoever the trier of the facts may be, it is equally important that the rules of evidence be observed, to the end that a person accused of crime may be accorded the full benefit of such evidence competently adduced in his behalf.

The Court of Appeals cited the *Michelson* case, but, we submit, deviated from the principles therein set forth.

QUESTION NO. 3

Whether the unjustifiable insinuation by the Government that petitioner had engaged in a smuggling operation was not prejudicial and reversible error.

In the course of the examination of another character witness for petitioner, one Feldhun, the prosecutor asked (R. 100):

> "Tell me, Mr. Feldhun, did it come to your attention, a rumor in July or August of this year, that Mr. Sorkin had engaged in or had possibly engaged in a smuggling operation?"

A prompt objection to this question was overruled (R. 100-102). The question was withdrawn but the Court, with commendable candor, remarked (R. 102):

> "The only obligation I think that the Government is under is a matter of honor never to ask a question like that without having some foundation for it."

The significance of this observation is manifestly that the District Court inferred from the very posing of the question that some such rumor had come to the Government's attention. So far as the alleged smuggling is concerned—or even the circulation of a report on the subject—to petitioner the entire matter is shrouded in complete mystery. This is another striking instance of Vergil's classic characterization, "*Fama malum qua non aliud velocius ullum.*"

We are familiar with the latitude allowed in the cross-examination of character witnesses. Equally important, however, is the close qualification of the rule, namely, that character witnesses may be asked "as to their knowledge of prior criminal offenses *if such offenses actually existed.*" *Krogmann* v. *United States* (C. A. 6, 1955), 225 F. 2d 220. The District Court was evidently aware of this principle, but there was no preliminary hearing or investigation, and the harm was done.

It is scarcely necessary to refer to the rule that evidence of other crimes is not generally admissible—a proposition as well grounded in the law as any that readily comes to mind. In a leading illustrative case, *Kempe* v. *United States* (C. A. 8), 151 F. 2d 687, it was said:

> "The general rule is that in a criminal prosecution proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged in the indictment, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged. The accused is to be convicted, if at all, on evidence showing his guilt of the offense charged in the information. It is not competent to prove that the accused committed other crimes of a like nature for the purpose of showing that he would be likely to commit the crime charged in the information. Evidence of other crimes compels the defendant to meet charges of which the information or indictment gives no information, confuses him in his defense and raises a variety of false issues. Thus the attention of the jury is diverted from the charge contained in the indictment or information."

Several recent cases reiterating the familiar rule are *Lloyd* v. *United States* (C. A. 5), 226 F. 2d 9; *Helton* v. *United States* (C. A. 5), 221 F. 2d 338; *Fallen* v. *United States* (C. A. 5), 220 F. 2d 946, cert. den. 350 U. S. 924; and *Benton* v. *United States* (C. A. 4), 233 F. 2d 491. In this Circuit, even in a Mann Act prosecution, evidence that appellant had had improper relations with a certain other woman was held incompetent and prejudicial. *United States* v. *Krulewitch* (C. A. 2), 145 F. 2d 76. See also *Paris* v. *United States* (C. A. 8), 260 F. 529; *Kraft* v. *United States* (C. A. 8), 238 F. 2d 794; *Fish* v. *United States* (C. A. 1), 215 F. 544; Underhill Criminal Evidence, 5th Ed., Section 205.

In excluding matter of this type the Courts have not differentiated between substantive proof of other crimes

and mere insinuations or innuendoes directed to the same effect. Herein it is not possible to say with certainty whether the suggestion complained of may not have had a bearing upon either the adjudication of guilt or the sentence imposed, or both.

QUESTION NO. 4

Whether the District Court did not err in excluding evidence bearing upon petitioner's intent.

The Government's first witness was John J. Hooker, a special agent for the United States Bureau of Foreign Commerce (R. 13), who testified in substance that he did not obtain from petitioner any explanation of the erroneous description (R. 18). To establish petitioner's unfamiliarity with the subject-matter of the interrogation and his absence of criminal intent, petitioner himself was asked how many times Hooker or any of his associates visited his office (R. 170), which the Court excluded on objection, even striking the remarks of counsel as to the purpose (R. 170-171).

In a case where the intent of petitioner is important, it was improper to hamper the fullest possible inquiry on the subject. On the other hand, the refusal to allow the proof proffered might well lead to the inference that the acts under investigation constituted a pattern of conduct, with whatever unsavory implications might flow therefrom.

CONCLUSION

For all of the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.

New York, N. Y., April 6, 1960.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 265—October Term, 1959.

(Argued February 2, 1960 Decided March 9, 1960.)

Docket No. 26067

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWIN J. SORKIN,

Defendant-Appellant.

Before:

MEDINA and WATERMAN, *Circuit Judges*, and MADDEN, *Judge, United States Court of Claims.**

Appeal from a judgment of the United States District Court for the Southern District of New York. E. J. Dimock, *Judge.*

Edwin J. Sorkin appeals from a judgment of conviction of violations of 18 U. S. C. Section 1001 and 50 U. S. C. Section 2025. Affirmed.

KEVIN THOMAS DUFFY, Assistant United States Attorney, New York, N. Y. (George I. Gordon, Assistant United States Attorney, and S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York, New York, N. Y., on the brief), *for plaintiff-appellee.*

JACOB W. FRIEDMAN, New York, N. Y., *for defendant-appellant.*

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* Sitting by designation.

PER CURIAM:

Edwin J. Sorkin and his employer Minthorne International Co. Inc. were indicted for a violation of the false statement statute, 18 U. S. C. Section 1001[1] by submitting a false statement to the Department of Commerce on a Shipper's Export Declaration, and with exporting an electron tube, type 6326, valued at $440, without a validated export license, in violation of 50 U. S. C. Section 2025. See also 15 Code of Federal Regulations, Chap. III, Subch. B, Section 372.3. After a non-jury trial before Judge Dimock both defendants were found guilty on both counts. Sorkin was sentenced to 60 days imprisonment on each count, the sentences to run concurrently. Minthorne was fined $2500 on each count. Only Sorkin appeals.

Appellant sets forth four grounds for reversal. The argument most strongly urged is that the second clause of 18 U. S. C. Section 1001, upon which the charge was based, requires as an element of the crime that the false statement be material.[2] However, we find it hard to imagine a statement more clearly material. The proof amply demonstrates that had an accurate statement been made the validated export license, necessary for export, would have been denied. The falsification of the type and value of the electron tube described in the statement made it appear that a validated export license was not necessary and, therefore, permitted to be exported an article that but for the false statement, could not have been exported.

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[1] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both. (June 25, 1948, c. 645, 62 Stat. 749.)"

[2] But see *United States* v. *Silver*, 2 Cir., 1956, 235 F. 2d 375, cert. denied, 1956, 352 U. S. 880.

Appellant contends that it was error to strike the testimony of a character witness after the prosecution elicited on cross-examination that he had never talked to anyone about appellant or even "discussed" him. Appellant offers the somewhat strained interpretation that despite never having discussed him, the character witness "may have heard a score of others say of the defendant that the latter is a trustworthy and honorable gentleman." Even if we were to adopt this interpretation, the testimony would still have been properly stricken as the necessary foundation for it had not been laid, and we must assume it could not have been laid, for otherwise additional questions could have been put to the witness, and this was not done. See *Michelson* v. *United States*, 1948, 335 U. S. 469 at 478. We hold that in striking the testimony the trial judge was acting well within his discretion.

In the course of the examination of another character witness, the prosecutor inquired as to the existence of a rumor that Sorkin had engaged in a smuggling operation. After some colloquy the question was withdrawn. We are now asked to reverse a conviction rendered after a trial, without a jury, before an able and experienced judge on the ground that the withdrawn question may have influenced the decision. We see no basis for any such inference. Moreover, we hold that on this record the question was asked in good faith and was therefore proper.

The proffered evidence that government agents had repeatedly visited appellant and had discovered no wrongdoing other than as charged in the indictment in this case was properly rejected.

Affirmed.